IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.2.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

CRIMINAL APPEAL Nos.983,984 and 990 of 1999.

Hindustan Insecticides Ltd.,
at 312,Cross Cut Road,
Gandhipuram,Coimbatore-12
rep. by its Regional Sales Manager
Mr.A.Manoharan ..Appellant/Complainant
in all the appeals

-vs-

1. Kulothunga Chozan
Partner,
Sri Lakshmi & Co.,
1-A, Annadhanapatti
Main Road, Sevvapet
Salem-2

2. Veerapandian
Partner
Sri Lakshmi & Co.,
1-A, Annadhanapatti
Main Road, Sevvapet
Salem-2 .. Respondents/ accused
2 and 3 in all the appeals.

These appeals are filed under Section 378 (4) Crl Precedure Code against the Judgment made in C.C.No.229 of 1994,C.C.No.50 of 1994 and C.C.No.228 of 1994 dated 9.9.1999 on the file of the Judicial Magistrate No.III, Salem respectively.

For appellant : Mr.S.Kalyanaraman

For respondents : Mr.S.Rajanbabu.

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JUDGMENT

The complainant in C.C.No.229 of 1994,C.C.No.50 of 1994 and C.C.No.228 of 1994 is the appellant in all the three appeals. In all the above mentioned three priviate complaints, the complainant and the accused are the one and the same.

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2. C.C.No.229 of 1999 was preferred by the complainant for the offence under Section 138 of the Negotiable Instruments Act on the ground that the cheque for Rs.1,50,000/- dated 15.2.1994 drawn by A2 on behalf of A1 partnership firm was dishonoured on presentation and that the said cheque was drawn by the accused to discharge the subsisting debts due to the complainant.

3.C.C.No.50 of 1994 was preferred by the complainant in respect of two cheques dated 30.1.1994 and 31.1.1994 for a sum of Rs.1,50,000/- each drawn by A2 on behalf of A1 partnership firm. When the cheques were presented into the Bank , they were dishonoured on the ground that "there was no sufficient funds in the account of drawer".

4.C.C.No.228 of 1999 was preferred by the complainant in respect of a dishonoured cheque dated 22.2.1994 for a sum of Rs.1,50,000/- drawn by A2 on behalf of A1 partnership firm.

5.All the three complaints were taken on file by the learned Judicial Magistrate and on appearance of the accused on summons copies under Section 207 Cr.P.C. were furnished to the accused when the offence was explained to the accused, they pleaded not guilty.

6.In C.C.NO.229 of 1994, on the side of the complainant P.Ws 1 to 3 were examined and Exs P1 to P10 were marked and on the side of the accused, the second accused has examined himself as D.W.1 and Ex B1 was marked.

b) In C.C.No.50 of 1994, on the side of the complainant ,P.Ws 1 to 4 were examined and Exs P1 to P21 were marked. On the side of the accused, the second accused has examined himself as D.W.1 and B1 was marked.

c) In C.C.No.228 of 1994 on the side of the complainant, P.Ws 1 4 were examined and Exs P1 to P11 were marked. On the side of accused, the s econd accused has examined himself as D.W.1 and B1 was marked.

7. C.C.No.229 of 1994:- P.W.1 in his evidence would depose that he is working as Regional Sales Manager in Hindusthan Pesticides Company at Coimbatore and the first accused is running a Company by name Lakshmi and Company at Salem and A2 and A3 are the partners of A1 and that during 1992-1993, the complainant Company had supplied pesticides to A1 Company to the tune of Rs.13,00,000/-. EX P1 is the Ledger for the account maintained for the said transaction(Page Nos.164 and 165) and that as on 31.3.1993, a sum of Rs.1,75,358.75 is the amount due from A1 Company to the Complainant Company; Ex P2 is the Ledger for the year 1993-1994(page No.55) for the transaction and as per Ex P2, a sum of Rs.12,93,205,27 was the amount due to the complainant from A1 Company; Ex P3 is the ledger relating to the year 1994-1995(Page No.258) and as per Ex P3, a sum of Rs.12,94,665.27 is the amount due as on 30th July 1995; Ex P4 is the cheque drawn by the second accused on behalf of the first accused Company for a sum of Rs.1,50,000/- dated 15.2.1994 in Catholic Syrian Bank in favour of

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the complainant. When the said cheque was deposited on 2.7.1994 in Bank of Baroda, Coimbatore Branch, it was returned with an endorsement stating that there is no sufficient funds to the account of the drawer on 6.7.1994; Ex P5 is the pay- in- slip; Ex P6 is the Banker's advice; Ex P7 is the debit note; Ex P8 is the copy of the notice dated 13.7.1994 issued by the complainant to the A1 Company. The said notice was returned; Ex P9 is the returned postal cover. Hence the complaint.

7a) P.W.2 ,Geetha is the Manager of Catholic Syrian Bank, Panaimarraththupatti Branch. She would depose that Ex P4 is the cheque belonging to their bank and the same was dishonoured on 6.7.1994 on the ground that there was no sufficient funds in the account of the drawer; Ex P10 is the copy of statement of account for A1 Company and that on 31.8.1994, there was only a balance of Rs.2349.85 in the said account in credit.

7b) P.W.3 Murugavel is the Manager of the Bank of Baroda, Coimbatore Branch. He would depose that Ex P5 and Ex P7 are the debit advices and A1 company is having a current account with their bank in C.A.No.41817 and that Ex P6 was the cheque returned by their Bank stating that there was no sufficient funds in the account of the drawer.

7c) P.W.4 is the Sales Executive of the Hindusthan Pesticides Company at Salem branch and that from 1993 onwards the complainant company is supplying pesticices to A1's company and that during 1993-1994 goods worth Rs. 2,80,000/- was supplied by the complainant Company to A1 company and that the accused had given seven cheques towards the subsisting debts and when those cheques were presented in Catholic Syrian Bank, Panaimaraththupatti Branch on various dates, they were dishonoured . When incriminating circumstances were put to the accused, they denied their complicity with the crime.

8. C.C.No.50 of 1994:- P.W.1 Manoharan, Zonal Sales Manager of the Dejure Complainant Company was examined as P.W.1 He has corroborated the evidence of P.W.1 in the earlier cases and that during 1993-1994, A1 Company was supplied with Pesticides to the tune of Rs.12.9 Lakhs and the accounts were submitted in C.C.No.229 of 1994 by him and that for the above said debt, A1 Company had issued cheque for Rs.1,50,000/- dated 27.1.1994 signed by A2 and on 29.1.1994 another cheque for Rs,1,50,000/- was drawn by A2 in favour of the Complainant Company and another cheque dated 30.1.1994 for Rs.1,50,000/- was drawn by A2 in the name of Complainant and on 31.1.1994 another cheque for Rs,.50,000/- was drawn by A2 in favour of the complainant. Those cheques are Exs P1 to P4. In all the cheques, A2 is a signatory and when the first cheque was presented on 27.1.1994 in the Bank of Baroda, Coimbatore Branch, it was dishonoured by stating that the drawer had no sufficieint funds in his account; Ex P5 is the counter foil. Ex P6 is the counterfoil relating to the second cheque dated 29.1.1994 which was also dishonoured on the same ground. Ex P7 and Ex P8 are the debit advices. The third cheque was presented on 31.1.1994 in the Bank of Baroda and the fourth cheque was presented on 31.1.1994; Ex

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P9 and Ex P10 are the counterfoils and both the cheques were returned on 4.2.1994 on the ground that there was no sufficient funds in the drawer's account. EX P11 is the notice issued by the complainant to the accused and another notice was sent on 11.2.1994. Both the notices were returned Exs P12 and P13 are the returned postal covers. Exs P14 and Ex P15 are the copies of the notices ; Ex P16 is the letter written by the accused dated 22.12.1993 to the complainant.

8a) P.W.2 Geetha, is the Manager of Catholic Syrian Bank,Panaimaraththupatti Branch. According to her, Exs P1 to P4 are the cheques in their bank and the accused is having an account No.5/91 and the cheques were returned by the bank on the ground that there is no sufficient funds in the drawer's account. EXP7 is the bank intimation and Ex P8 is the memo; Ex P17 is the statement of account of the accused and as on 31.1.1994, a sum of Rs.2349.85 only was available in the credit of A1's account.

8b) P.W.3 Murugavel, is the branch Manager of Bank of Baroda,Coimbatore branch. According to him, the complainant was having current account in Current Account No.41817 and Ex P5 and
Exs P6,P9, and 10 are the counterfoils for the cheques presented in their bank on 23.1.1994.Ex P18 is the debit advice dated 1.2.1994; Ex P19 is the debit advice dated 2.2.1994; Ex P20 is the debit advice for Rs.235/-.Ex P21 is the debit advice d ated 3.2.1994.Exs P7,P8 and P11 cheques were returned by Catholic Syrian Bank,Panaimaraththupatti Branch on the ground that there was no sufficient in the drawer's account.

8c) P.W.4 Mohamed Ibrahim, is the Junior Sales Manager of the Complainant Company. According to him, during 1993-1994 the complainant company had supplied pesticides worth Rs.12,80,000/- to A1 company and that discharge of the said debt, the accused Company had issued seven cheques dated 22.12.1993 drawn on various dates. Ex P16 is the letter given by A1 to the complainant company. When incriminating circumstances were put to the accused, they denied their complicity with the crime.

9. C.C.No.228 of 1994:- Manoharan was examined as P.W.1 on behalf of the complainant as defacto complainant. In all other aspects, he would corroborate the evidence of P.W.1 in C.C.No.229 of 1994 and that during 1993-1994, the complainant company had supplied pesticides to the tune of Rs.12.9 lakhs to A1 Company and in discharge of the said debt, A1 company had drawn a cheque of Rs.1,00,000/- dated 28.2.1994; Ex P2 cheque dated 28.2.1994 for Rs.1,00,000/- in favour of the complainant company and in both the cheques A2 has signed . When the cheques were presented in Bank of Baroda,Coimbatore Branch on 5.7.1994 , they were returned with an endorsement that there is no sufficient funds in the drawer's account on 8.7.1994;Ex P3 is the pay-in-slip;EX P4 is the advice and when the cheque for Rs.1,00,000/- was presented in the Bank of Baroda, Coimbatore Branch on 7.7.1994, the same was returned with an endorsement no sufficient funds in the drawer's account.EX P5 is the pay-in-slip; Ex P6 is the bank advice.On 14.7.1994, the complainant had issued the suit notice ;Ex P7 is the copy of the said notice; The said noticie was returned on 22.7.1994;Ex

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P8 is the returned postal cover;Ex P9 is the authorisation letter issued by Dejure complainant.

9a) P.W.2 Geetha is the Branch Manager of Catholic Syrian Bank Panaimaraththupatti branch. She would identify that Ex P7 is the advice given by her bank and when ExP1 Cheque for Rs.1,00,000/- dated 28.2.1994 was presented in her bank, it was returned with an endorsement "no sufficient funds in the drawer's account" and when Ex P2 cheque was presented in her bank , it also met with the same fate and Ex P10 is the copy of the statement of account for the period from 31.12.1993 to 28.2.1994. On 8.7.1994, a sum of Rs.2,349.85 alone was in the credit of A1's company account No.5/91.

9b) P.W.3 Murugavel is the branch Manager of Bank of Baroda, Coimbatore branch. He would state that the complainant Hindusthan Pesticides Limited was having a current account No.41817 in their main branch and Exs P3 and P5 are the counterfoils and that Exs P4 and P6 were returned on the ground of insufficient fund in the account of A1.

9c) P.W.4 is the Junior Sales Manager of Complainant's company at Salem. According to P.W.4, during 1993, pesticides were supplied by the complainant company to the tune of Rs.2,80,000/- and in discharge of the said debt, the accused had given seven cheques and when they were presented in Catholic Syrian Bank, they were dishonoured on the ground that there were no sufficient funds in the drawer's account. When incriminating circumsmtances were put to the accused, they denied their complicity with the crime.

10. Now the point for determination in these appeals is whether the individual notice is necessary to each of the partners viz., A2 and A3 of A1's partnership firm in filing a private complaint under Section 138 of the Negotiable Instruments Act?

11. I heard Mr.S.Kalyanaraman, the learned counsel appearing for the appellant/complainant and Mr.S.Rajababu , the learned counsel appearingfor the respondents/accused and considered their rival submissions.

12. The point:

After going through the oral and documentary evidence let in by the complainant as well as the accused, the learned trial Judge has convicted A1 in all the three cases under Section 138 of the Negotiable Instruments Act and acquitted A2 and A3 on the ground that there was no notice issued before filing the complaint individually to A2 and A3.

13. The learned counsel appearing for the complainant/appellant against the acquittal of A2 and A3 relying on a decision reported in M/s B.Raman, B.Ramesh and B.Raghu-v- M/s Shasun Chemicals and Drugs Ltd., represented by its Company Secretary, NO.3, Doraisamy Road, T.Nagar, Chennai-600 017 and contended that only in case of Company, it has been

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decided by a Division Bench of this Court that before filing a complaint against any of the Directors of Company, notice shall go to the each of the Directors giving an opportunity to explain as to under what circumstances, the cheque was drawn and under which circumstance the cheque was bounced.

14. The learned counsel for the appellant would contend that in the said dictum , it was not observed that the same rule will be applicable to the partnership firm also and so it is not necessary to send individual notice to each of the partners of the partnership firm viz., A1. The said contention of the learned counsel for the appellant will not hold any water because even in the complaint itself the first accused has been described as Sri Lakshmi and Company, Shevvapet(Partnership firm). Even in the above said ratio, it has been specifically mentioned that Under Section 11 of CPC, an incorporated person or even an unincorporated association or body of persons like a partnership can be a person and that notice to every person including the Director who is sought to be prosecuted is mandatory. The Director includes the persons also since the partnership can only be considered as 'person' under Section 11 of CPC. In the above said dictum, it is clearly held to whom notice shall be given and the purpose of giving such notice and the effect of notice being not given to each of the Directors or the partners in the company or the partnership firm. The learned Bench has observed as follows:

> " A reading of Section 138 and 142 would make it clear that the complainant or payee can approach the Court to make a complaint against the drawer only when the drawer fails to make the payment, after receipt of statutory notice, witnhin fifteen days. That means, the cause of action would arise only when the drawer, who received statutory notice, fails to comply with the demand, through notice sent by the payee, within fifteen days of the receipt of notice. Only thereafter, the complainant can approach the Court within one month of the date on which the said cause of action arisies ie., the complainant can report to the Court about the cause of action that an opportunity has been given to the drawer and, despite then, the drawer has failed to make payment within fifteen days of the receipt of notice and, as such, he is liable to be punished. In other words, the cause of action is not mere presentation of the cheque nor mere dishonour of cheque whereas the real cause of action is the non payment of the cheque amount or non-compliance of the demand through the notice by the drawer within the statutory period. This would indicate that even though Section 138 would provide that the drawer shall be deemed to have committed an offence when the cheque drawn by the drawer has been dishonoured on account of in sufficiency of amount, he

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> cannot, straight a way, be prosecutred. That means, the legislature mandates the payee or the complainant to give an opportunity to the drawer to recitfy the mistake or to remedy the situation, to avoid the filing of the complaint".

What applies to the Director of a Company equally applies to the partner of a partnership firm also. The principle laid down in the above said ratio decidendi is that before prosecuting a person under Section 138 of the Negotiable Instruments Act an opportunity must be given to him by way of a notice giving fifteen days to him to discharge the debt. Only if he fails to discharge the debt within the stipulated time under the provision of law, then only the complaint can proceed against him . Admittedly in all the three cases on hand, the complainant has not given any notice to A2 and A3 thereby providing an opportunity to them to discharge the debt within fifteen days from the date of notice.

15. The learned counsel appearing for the appellant made a vain attempt by saying that Section 141(2) of the Negotiable Instruments Act will not be applicable to the present facts of the case. But even in Section 141(2)(b) of the said Act it has been clearly defined that director in relation to the firm himself is a partner in the firm. So under Section 141 of Negotiable Instruments Act will also be applicable to the partnership firm.

16. Under such circumstances, the learned trial Judge has come to a correct conclusion that the complaint against A2 and A3 are not maintainable and consequently dismissed the complaint against A2 and A3 which in my opinion does not warrant any interference from this Court , since it is neither illegal nor infirm. Point is answered accordingly.

17. In fine, Crl.A.NOs.983/1999, 984 of 1999 and 990 of 1999 are dismissed confirming the Judgment in C.C.Nos.228/94, 50 of 1994 and 229 of 1994 on the file of Judicial Magistrate No.III, Salem. If A2 has not surrendered yet before the trial Court to undergo the sentence himself on behalf of A1 Company, then he shall surrender forthwith before the trial Court to undergo the sentence.

sg

Sd/-
Assistant Registrar,

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Sub Assistant Registrar.

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To

1.The Judicial Magistrate No.III,
Salem.
2. -do thro the Chief Judicial Magistrate, Salem.
+ One cc to Mr. V. Srinivasan Advocate SR 8287.
AVA (co)
sg 16/2/07

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